

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO. AAU 066 OF 2024**  
**[Lautoka High Court: HAC 195 of 2016]**

**BETWEEN** : **ISSAC JAMES**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : Qetaki, RJA

**Counsel** : Mr. M. Fesaitu for the Appellant  
Mr. S. Seruvatu for the Respondent

**Date of Hearing** : 28 August, 2025

**Date of Ruling** : 22 October, 2025

**RULING**

**(A). Background**

- [1] The Appellant was charged with others for two counts of aggravated robbery, contrary to section 311 (1)(b) of the Crimes Act 2009.
- [2] The Appellant maintained his plea of not guilty and the matter proceeded to voir dire trial (from 4<sup>th</sup> to 24<sup>th</sup> April 2024) and trial (from 1<sup>st</sup> to 22<sup>nd</sup> May 2024) at the Lautoka High Court before Justice Aluthge.
- [3] On the 24<sup>th</sup> of May 2024, the court delivered its judgment and convicted the Appellant for both counts of aggravated robbery and was sentenced to 8 years imprisonment with a non-parole period of 7 years.

[4] Aggrieved by the conviction and sentence, the Appellant filed an untimely appeal against sentence on 4<sup>th</sup> September 2024. This appeal is out of time by 49 days. However, the Appellant has not made any submissions on the issue of delay. The Respondent has submitted that there are no reasonable explanations for the delay, as such the Court can proceed to assess whether there is a ground of merit.

**(B). Facts**

[5] The learned trial judge in the sentencing decision at paragraphs [3] and [4] had summarized the facts emerging from the trial as follows:

*“The facts were that the complainant and his wife were running a business at the Lautoka Market. On the day of the incident, the complainant took his wife and the two kids, a son aged 10 and a daughter aged 01, left for Khasmir in his Toyota Prado to pick up his sister, who had come from New Zealand. There were two bags containing clothes, a gold chain, \$16,000.00+ money and two smartphones in the vehicle. His wallet was in his pocket. The money collected from his business was to be deposited in the bank the next morning.*

*On their way, the complainant stopped his vehicle in front of a shop in Khasmir at around 7.20pm. While the engine was on, he went inside the shop to buy some stuff for the kids. His wife sat in the front passenger seat with his daughter and the son in the back seat. Suddenly, he heard his wife scream. When he turned back, he saw an Itaukei guy sitting in the driving seat of his vehicle. He ran on the vehicle and forced himself inside it to get the Itaukei guy out. There were eight Itaukei men, and the others loomed soon. The 1<sup>st</sup> Offender and another started to assault the complainant in full view of the public. One of them picked up his wallet. The 2<sup>nd</sup> Accused kicked an old onlooker Indian man. The complainant’s wife managed to get out of the vehicle with their daughter. One robber dropped the son on the pavement. All the robbers got in the vehicle and fled the scene. The whole incident was captured by the CCTV camera installed at the shop. The CCTV footage displayed a Chicago- type systematic and coordinated brutal attack on the victims and their property rights.”*

**(C). Grounds of Appeal**

**Against conviction**

[6] **Ground 1**

*The learned trial judge had erred in law and in facts by ruling that the Appellant be tried in absentia during prosecution's case in the voir dire hearing when there is no proper basis to do so causing prejudice to the Appellant's right to a fair trial therefore causing a substantial miscarriage of justice.*

**Ground 2**

*The Appellant's right to a fair trial is prejudiced as the learned trial judge had not allowed the Appellant's request to have the prosecution witnesses who testified against the Appellant to be recalled during the voir dire hearing therefore causing substantial miscarriage of justice.*

**Ground 3**

*The learned trial judge had erred in law by admitting the Appellant's record of caution interview statement into evidence, in doing so, was erroneous in assessing the evidences.*

**Against sentence**

**Ground 1**

*The learned trial Judge erred in principle by fixing a non-parole period too close to the head sentence, denying or discouraging the Appellant the possibility of rehabilitation.*

**Ground 2**

*The learned trial Judge had erred in principle as a result of double counting by taking into account an aggravating factor that the Appellant had punched the first complainant which was already reflected in the level of culpability as to the nature of the offending. Therefore the trial Judge was in error to have enhanced the Appellants sentence by an additional 6 months added to the aggravating factors.*

**(D). Appellant's Case**

[7] **Ground 1-**The Appellant submits that the two conditions to be satisfied by the court in trying an accused in absentia were not satisfied: **Waqa v State** [2020] FJCA 222, AAU084.2018 (6 November 2020) which at paragraph [16] states:

*“[16] In the absence of any other provision in the Criminal Procedure Code, 2009 regarding an accused being tried in absentia in the High Court, section 14(2)(h)(i) of the Constitution would provide guidance to court as to the conditions to be satisfied before an accused can be tried in his absence. Those conditions are that (i)the accused should be served with summons or similar process requiring his attendance at the trial and (ii) despite summons or similar process the accused should have chosen not to attend (waiver of the right to be present). Unless the court is satisfied that both these preconditions have been fulfilled, the right guaranteed by section 14(2)(h)(i) of the Constitution cannot be taken away and an accused cannot be tried in his absence in the High Court.”*

[8] There was no basis for the Appellant to be tried in absentia. The Appellant was not informed by the trial Judge when he appeared during the pre-trial stages when the matter had already been fixed for trial that he would be tried in absentia if he fails to appear in Court for the trial.

[9] It would have been unforeseen for the trial Judge at that point in time to actually know whether the Appellant had deliberately and voluntarily decided not to appear in court. He was in his finding relying on the Affidavit of a Warrant Officer which eventually turns out to be untrue that the Appellant had escaped from lawful custody.

[10] As such, the Appellant's right to a fair trial is prejudiced resulting in a substantial miscarriage of justice.

[11] **Ground 2-** The voir dire ruling indicates that the voir dire hearing was still in process when the Appellant was produced in court. At paragraph [111] of ruling, it seems by the time the Appellant was produced to court, the prosecution had already closed its case. According to the Appellant he had asked the trial Judge to recall the prosecution witnesses who had testified against his case however, the trial Judge did not allow it.

The power to recall witnesses is specified in section 116 of the Criminal Procedure Act 2009. Its application is clarified in **Kumar v State** [2013] FJCA 59; AAU 16.2013 (17 June 2013). The main incriminating evidence was his admission in the caution interview statement, together with the CCTV footage. Their admission under the circumstances complained of by the Appellant has caused a substantial miscarriage of justice.

- [12] **Ground 3**- The appellant challenges the admissibility of the caution interview statement which the learned judge ruled admissible during the voir dire hearing. The Appellant relies on **Tuilagi v State** [2018] FJSC 3; Cav0013.2017 (26 April 2018), **Hakik v State** [2017] FJCA 184; AAU0047.2015 (7 October 2017).
- [13] The appellant submits that the ground of appeal raised has a reasonable prospect of success for the Court of Appeal to review the totality of the evidences and in doing so, whether the Court is completely satisfied that it should interfere with the ruling by the trial Judge having admitted the caution interview statement into evidence.

#### **(E). Respondent's Case**

##### **Conviction Grounds 1, 2, and 3**

- [14] The Appellants grounds of appeal against conviction collectively challenge the conduct of the voir dire proceedings and the Respondent's objections are interrelated, as they each pertain to fundamental aspects of the voir dire hearing that determined the admissibility of the admissions of the Appellant's caution interview statement. The Appellant's argument that the learned trial Judge had erred by proceeding with the voir dire hearing in his absence is without merit.
- [15] The learned trial Judge found (page 111 of the Voir Dire Ruling) that the Appellant willfully failed to appear before the Court to challenge the prosecution evidence despite having clear knowledge of the schedule voir dire hearing and trial dates. The Court properly relied on both the sworn Affidavit of the warrant officer confirming the Appellant's escape from lawful custody and took judicial notice of the court records establishing the Appellant's awareness of the proceedings, thereby justifying the decision to proceed in absentia.

- [16] It was the Appellant who choose not to attend the voir dire hearing, so he cannot now complain about mission his chance to question witnesses or that his right to fair trial was violated by the refusal to recall prosecution witnesses. Simply put, the Appellant was not in custody and free to attend court, yet he chose not to. His failure to appear until arrested demonstrates disregard for the proceedings and by voluntarily skipping part of the voir dire hearing, he forfeited the chance to question witnesses at that stage.
- [17] In addition, upon the Appellant's appearance in Court, he was provided the full transcripts of the prosecution's case to ensure procedural fairness and acted fairly by refusing to repeat the process. This remedial measure maintained trial integrity and complied with natural justice requirements, preventing any potential miscarriage of justice.
- [18] The appellant further urges that the learned trial Judge had wrongly assessed the evidence that the Appellant's evidence was inconsistent with the voir dire grounds which again is without merit.
- [19] The learned Judge properly exposed material inconsistencies in the Appellant's evidence, these included: (1) a direct contradiction between his initial claim that *no formal interview occurred* (asserting Constable Simione was "merely asking questions") and his subsequent allegation of *coercion during that same interview*; (2) his failure to include in his written voir dire grounds the later-raised claim of assaults during transport by officer Qase, which omission deprived the prosecution of an opportunity to address it during the admissibility hearing; and (3) the inherent implausibility of his assertion that he was forced to sign a *prepared statement*, given that the document contained personal details only he could have provided.
- [20] The Appellant's absence during the prosecution's case of the voir dire hearing, being of his own making, cannot now form the basis of a legitimate complaint about the fairness of the process.
- [21] Therefore, at the voir dire hearing, the learned trial Judge's conduct of the proceedings was meticulous, fair, and in full conformity with both statutory requirements and binding precedent, leaving no room for a legitimate claim of substantial miscarriage of justice.

## **Sentence Grounds 1 and 2**

- [22] Under section 18(1) of the Sentencing and Penalties Act the imposition of a non-parole period serves two critical purposes: (1) deterrence and community protection, and (2) providing the offender an opportunity for rehabilitation and this dual objective ensures that sentencing balances societal interests with the offender’s potential for reform.
- [23] The discretion to fix a non-parole period rests squarely with the sentencing Judge, as emphasized in **Natini v State** [2015] FJCA 154. The Court of Appeal affirmed that the trial judge, being best positioned to assess the *specific circumstances of the case*, is entitled to determine an appropriate non-parole period. In this case, the learned trial Judge meticulously evaluated the *aggravating features* of the offence, particularly noting the “*Chicago-type systematic and coordinated brutal attack*” captured on CCTV (Sentence at [4]).
- [24] Thus in weighing these circumstances, the trial Judge struck a deliberate balance between the Appellant’s rehabilitation prospects and the need for community protection, ultimately fixing a non-parole period of six years. The period imposed is not only proportionate to the gravity of the offence but also justified by the exceptional brutality and coordination evident in the Appellant’s actions.
- [25] In respect of Ground 2, the Respondent submits that the Appellant’s arguments that the learned trial Judge taking into account irrelevant factor of him kicking an elderly on-looker as an aggravating factor is misconceived and without merit.
- [26] In response, the Judge was right to treat the Appellant’s needless attack on an elderly bystander as an aggravating factor in sentencing. While the robbery itself was serious enough, the Appellant went out of his way to kick an innocent old man who wasn’t involved-showing a deliberate choice to cause extra harm. This wasn’t just about stealing anymore; it was about terrorizing the community, as shown by the shocking CCTV footage that spread widely and alarmed the public. The law clearly allows judges to consider such unnecessary violence when sentencing especially when it makes the crime more frightening to society. There was nothing unfair or irrelevant about the learned trial Judge taking this into account-it simply reflected the true seriousness of the Appellant’s actions that day.

**(F). Discussion /Analysis**

- [27] The three grounds of appeal against conviction “collectively challenge the conduct of the voir dire proceedings”, and they are interrelated as they question the fundamental aspects and purpose of the voir dire which is to determine the admissibility of the admissions made by the Appellant when under caution interview. The law recognizes the significance of the voir dire and its effects on the Appellant and recognizes that the Appellant must be present when voir dire is held, and if not present, the trial cannot proceed in his absence unless certain requirements are complied with. The purpose is to ensure that that the Appellant’s right to a fair trial is not prejudiced.
- [28] The test for leave to appeal against conviction and sentence is “*reasonable prospect of success*”: see **Caucau v State** AAU0029 of 2016: 4<sup>th</sup> October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016:4<sup>th</sup> October 2018[2018] FJCA 172 and supported by a line of authorities in order to establish arguable grounds: **State v Vakarau** AAU0052 of 2017:4<sup>th</sup> October 2018, **Sadrugu v State** Criminal Appeal N0.AAU0057 of 2015:06 June 2019[2019]FJCA 87, **Waqasaqa v State** [2019] FJCA 144;AAU83.2015 (12 July 2019) from non-arguable grounds: **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014]FJCA 106;AAU10 of 2014 and **Naisua v State** [2013] FJCA 14;CAV 10 of 2013 (20 November 2013).
- [29] Section 14(2) (h) of the Constitution states that every person charged with an offence has the right to be present when being tried, unless-
- (i) *the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend; or*
  - (ii) *the conduct of the person is such that the continuation of the proceedings in his or her presence is impractical and the court has ordered him or her to be removed and the trial to proceed in his or her absence.(Underlining for emphasis)*
- [30] The above requirements, according to the Appellant were not satisfied and there was no basis for the Appellant to be tried in absentia. This contention is supported by **Waga v State** (supra), however, the case at paragraph [16] also state:

*“In the absence of any other provision in the Criminal Procedure Code, 2009 regarding an accused being tried in absentia in the High Court, section 14(2) (h)(i) of the Constitution would provide guidance to court as to the conditions to be satisfied before an accused can be tried in his absence.....Unless the court is satisfied that both these preconditions have been fulfilled, the right guaranteed by section 14(2)(h)(i) of the Constitution cannot be taken away and an accused cannot be tried in his absence in the High Court”.*(Underlining for emphasis)

[31] The Appellant argues that he was not informed by the trial Judge when he appeared during the pre-trial stages when the matter had been fixed for trial , that he would be tried in absentia if he fails to appear in Court for the trial. Whether the court can foresee or actually know at that stage of the proceedings that the appellant would not appear in court deliberately or voluntarily is difficult to answer and in the realm of uncertainty.

[32] On the facts and circumstances of the case and the proceedings, it is clear by reference to paragraph 111 of the Voir Dire Ruling that the Appellant willfully failed to appear despite his knowledge of the scheduled voir dire hearing and the trial dates. The Court relied on the sworn Affidavit of the Warrant Officer confirming the Appellant’s escape from lawful custody, although this was not the truth as it turned out. The Court also took judicial notice of the court records establishing the Appellant’s awareness of the proceedings. These factors justify the proceedings without the Appellant, at that stage of the proceedings. Paragraph [111] of the Voir dire Ruling states:

*“Sailasa Koroitoga (PW4), Constable Simione Yabia (PW5), Inspector Ranadi (PW7) and Ex-SP Simione Qase presented evidence in respect of Isaac James’s arrest, transport and interview. Isaac James (James) failed to come to court and challenge Prosecution evidence when he knew that his case was fixed for voir dire hearing and trial. The Court accepted the warrant officer’s affidavit evidence that James had escaped from lawful custody and also took judicial notice, based on the Court Record, of James’s knowledge of the hearing date in deciding to fix the matter for hearing in absentia. When James was arrested on a warrant and produced before the Court after the close of the Prosecution case, the transcripts of*

evidence against him were made available and he was given his right to present his evidence to ensure a fair hearing.” (Underlining for emphasis)

[33] The refusal to recall the witnesses was under the circumstances fair. The powers to recall or allow to recall for a witness at any stage of the trial, provided under section 116 of the Criminal Procedure Act 2009 are discretionary: **Kumar v State** (supra). The Appellant was not in custody at the commencement of the voir dire proceedings, and he was free to attend. He chose not to attend, thereby forfeiting the chance to question the witnesses at that stage of the proceedings. Upon his appearance in Court the Appellant was provided the full transcripts of the prosecution’s case to ensure procedural fairness. Under the circumstances the Court had put in place remedial measures that are consistent with natural justice requirements and to prevent potential miscarriage of justice.

[34] The learned trial Judge found there had been material inconsistencies in the Appellant’s evidence which were exposed by the learned trial Judge. Paragraphs 115 to 117 of the Voir Dire Ruling states:

*“115. James said four officers came and threatened him with assaults if he denied the allegations. When he denied the allegation, Bimlesh showed him footage on a laptop and still, he did not admit the allegation. He said he was then forced to sign a prepared statement. However, his grounds are inconsistent with his evidence. If he had denied the allegation at the interview, there was no need for him to file grounds of voir dire. He could have challenged the so-called admissions at the trial proper on the basis that those admissions were police fabrications.” (Underlining for emphasis)*

*116. Constable Simione (PW5), the interviewing officer had seen no injuries on James before or during the interview; He said James was fit and healthy; and that he received no complaint request for a medical examination; no one else had been present at the interview except the witnessing officer and the accused. He denied that before or during the interview James was assaulted, threatened or put pressure on him. The witnessing officer confirmed Simione’s evidence. The police evidence was not challenged.*

*117. James had never lodged formal complaint against any officer for assaulting, threatening or putting pressure on him...The medical reports of his co-accused Are Amae, and Jemesa Vakacegu were tendered from their custody. He too could have obtained a Court order to have his reports tendered in Court if a medical was done at a hospital.” (Underlining for emphasis)*

[35] The argument that the learned trial Judge was wrong or committed an error in not exercising the powers under section 116 of the Criminal Procedure Act 2009 in favour of the Appellant is under the facts and circumstances of this case misconceived.

[36] The admission of the caution interview statement after the prosecution’s case in the voir dire hearing was not challenged due to the Appellant’s choice not to attend the hearing. In **Tuilagi v State** (supra) the Supreme Court stated:

*“Although it would seem unusual for a court sitting in appeal to reverse the decision of a trial judge who held the Voir Dire on the admissibility of alleged confessions, it was held in the case of **Nirmal v R**.....that it is not necessarily wrong for an appellate court to do so having taken into account the facts of the particular case. I the case of **D.P.P v. Ping Lin**.....; their Lordships expressed the view that the court should not interfere with the judge’s ruling on the admission in evidence of the statement unless satisfied that the judge had completely wrongly assessed the evidence or had failed to apply the correct principles.” (Underlining for emphasis)*

[37] I am not persuaded/satisfied that that the learned trial Judge “*had completely wrongly assessed the evidence or had failed to apply the correct principles*”. Looking at the facts and circumstances in totality at the stage of the proceedings (Voir dire), it is safe to conclude that, the absence of the Appellant during the prosecution’s case of the voir dire hearing, was not due to the Court not following the requirements for trial in absentia, but due to the Appellant’s own choice not to attend with full knowledge of the schedule and days fixed for the hearing. The Court had done its part under the circumstances and the claim that there has been a substantial miscarriage of justice

has no substance and is misconceived. There is no merit in grounds 1, 2 and 3 against conviction. They are not arguable.

**Against sentence Ground 1 and 2**

[38] An appellate court will only interfere with sentence if the learned sentencing Judge had made one of the following errors;

(i) *Acted upon the wrong principle;*

(ii) *Allowed extraneous or irrelevant matters to guide or affect him;*

(iii) *Mistook the facts, or*

(iv) *Failed to take into account some relevant considerations.* See **Kim Nam Bae v State** [1999] FJCA 21;AAU0015u.98s (26 February 2013)

[39] The Appellant was sentenced to 8 years imprisonment with a non-parole period of 7 years. He is not challenging the length of the sentence but the closeness of the non-parole period to the head sentence, as the closeness of the non-parole period is viewed as a denial or discouragement of the possibility of the Appellant's rehabilitation. The other side of the coin is that the gap between the non-parole term and the head sentence should not be such as to be ineffective as a deterrent: **Tora v The State** [FJCA 20 at paragraph 2.

[40] The subject of closeness of non-parole period to the head sentence was reviewed and discussed at length in **Navuda v State** [supra]. There the difference of 1 year was considered insufficient, and the difference was increased to 2 years. In this case the difference is also 1 year, however, the Appellant is not a person of previous good character having sixteen previous convictions, two such previous conviction are still valid at the time of sentencing. The learned sentencing Judge observed in sentencing (paragraph 20), that his potential for rehabilitation is not that promising given his previous convictions. The 7 years non-parole period was therefore fixed to balance his chances of rehabilitation with the concerns for community protection.

[41] It is also alleged by the Appellant that the trial Judge had considered as a separate aggravating factor solely against the Appellant that he kicked an onlooker old Indian


man who was just witnessing the robbery. This is not correct as the 1<sup>st</sup> Offender like him had committed distinct acts warranting additional aggravated factors-see paragraph 17 of sentencing. As for the 1<sup>st</sup> Offender he had pulled the complainant and assaulted him repeatedly. As a consequence the 3 months was added to the Appellant's sentence to arrive at an interim sentence of 10 years 3 months. For the 1<sup>st</sup> Offender, 6 months was added to arrive at an interim sentence of 10 years and 6 months imprisonment.

[42] Having carefully considered the reasoning behind the fixing the non-parole period and the additional 3 months additional aggravating factor, and the arguments advanced by the Appellant in the two grounds against sentence, I conclude that grounds 1 and 2 against sentence have no merit. They are not arguable.

**Order of Court**

1. *Application for leave to appeal conviction is disallowed.*
2. *Application for leave to appeal sentence is disallowed.*



  
Hon. Justice Alipate Qetaki  
RESIDENT JUSTICE OF APPEAL

**Solicitors**

Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent